United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7124

To be argued by
JOSHUA GROSS

In The

United States Court of Appeals

For The Second Circuit

B

JOSEPH T. SCHETTINO,

Plaintiff-Appellant,

-against-

P/S

HARNESS TRACKS SECURITY INC.,

Defendant-Appellee.

On Appeal from Judgment of the United States District Court for the Southern District of New York.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

Contents

Contents

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- - - - - - - - - - - - - - - - - - - -x

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BRIEF FOR APPELLANT

STATEMENT

This appeal is from a judgment of the United States District Court, Southern District of New York, Knapp, J., dismissing the complaint in its entirety. The judgment is dated February 4, 1976, and is based upon a memorandum and order granting a motion, by the defendant, to dismiss the complaint. The action was brought under the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.

THE STATUTE

The Fair Credit Reporting Act (P.L. 91-508, 84 Stat. 1127-1136, 15 U.S.C. 1681 et seq.) is Title VI of the Consumer Credit

Protection Act of 1968; it was enacted October 26, 1970 and became effective April 25, 1971.

The Fair Credit Reporting Act (sometimes referred to as FCRA) is the first Federal regulation of the consumer reporting industry. Its basic purpose is to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. The law requires consumer reporting agencies to adopt reasonable procedures for providing information to credit grantors, insurers, employers and others in a manner that is fair and equitable to the consumer with regard to confidentiality, accuracy, and the proper use of such information. Pamphlet on Compliance With the Fair Credit Reporting Act, issued by the Division of Consumer Credit and Special Programs, Bureau of Consumer Protection, Federal Trade Commission, 4 C.C.H. Consumer Credit Guide, ¶11, 302.

THE COMPLAINT

For a first cause of action, plaintiff alleged that the action was brought under, and pursuant to, the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq., that, pursuant to the provisions of the Act, plaintiff was a consumer, and defendant was a consumer reporting agency in the business of private investigation, and furnishing, for a consideration, information as to

the personal character of persons connected with horse racing; that plaintiff was, from time to time, employed in owning and racing horses (16a)*; that defendant assembled, and circulated, in interstate commerce, an investigative consumer report, concerning plaintiff, containing false information intended to convey that plaintiff was engaged in corrupt and criminal practices relating to harness racing; that the said report was made without disclosure to plaintiff, without furnishing a copy to plaintiff, without maintaining reasonable procedures to limit circulation of the report to proper persons and purposes, without setting forth plaintiff's dispute of the information in the report, without reinvestigating the accuracy of the information disputed by plaintiff, without deleting inaccurate and unverifiable information, without notice of deletions of inaccurate or unverifiable information to persons who had received the report, without disclosing, to plaintiff, his right to request deletions and notifications, and "in total disregard of the provisions of the Fair Credit Reporting Act, 15 U.S.C.A. 1681-1681 t...".

For a second cause of action, plaintiff alleged that defendant's report concerning plaintiff was compiled "in a negligent and reckless manner" without regard for accuracy or provability; that plaintiff's reputation has been damaged, that plain-

* Numerical references are to pages of the appellant's appendix.

tiff has been denied employment, and that plaintiff "has been informed that he will be denied licenses by the racing commissions of the various states in which he wishes to be employed in the harness racing industry" (17a-18a).

THE ANSWER

In the answer, defendant denied the material allegations of the complaint, and affirmatively pleaded that a previous action, based upon the same facts, and the same report, resulted in a judgment in defendant's favor; that plaintiff was barred by the Statute of Limitations; that the subject report was qualifiedly privileged; that "there was no publication of the report..."; that the report was not a consumer report as defined in the Act; and that the report was true and disseminated without malice (20a-22a).

THE DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant moved the District Court to dismiss the complaint upon "the grounds that the plaintiff fails to state a claim upon which relief may be granted and on the ground that there is no issue as to any material fact..." (24a-25a).

Defendant, in a statement pursuant to the General Rules For the Southern and Eastern Districts, 9(g), contended that there was no genuine issue to be tried with respect to each of the following material facts:

1. That defendant is a New York corporation doing business in New Jersey.

2. That defendant "is engaged in investigating and supervising horse racing integrity and security and provides such information to a select group of individuals and organizations that contract for such services and who has the duty and obligation to maintain said integrity and security."

3. Defendant compiled a report on the plaintiff, and forwarded the report to "certain individuals and corporations as described in paragraph 2 of this statement."

4. The report deals with statements, made by confidential sources, regarding plaintiff's activities (26a-27a).

In support of the motion, defendant's attorney deposed that the subject report, "as to certain possibly unethical practices of the plaintiff", was "based on confidential informants." Defendant's attorney deposed, further, that "This report contains information by two informants as to the activities of the plaintiff, a short statement relating to an interview of the plaintiff, a description of the plaintiff, and a report of race tampering with an investigative opinion" (28a-30a).

Defendant's attorney argued that the subject report was not within the "meaning of the Fair Credit and Reporting Act"; that defendant was not a consumer reporting agency; that the report

was not a consumer report; that Section 1681a of the Act (15 U.S.C. 1681a) contains a finding that the "banking system is dependent upon fair and accurate credit report"; that the subject report, limited to racing violations, had nothing to do with banking or fair credit reporting; that "the same facts concerning the same parties, ... have been previously litigated... (31a)... and a decision was rendered in favor of the defendant"; that the complaint is therefore barred by the doctrine or res judicata and collateral estoppel; that the second cause of action is barred by the Statue of Limitations and collateral estoppel; and that plaintiff's prayer for relief includes a request for punitive damages, while 15 U.S.C. 1681 limits the plaintiff to actual damages and attorneys' fees (32a).

Attached to the moving papers was a copy of the report on the plaintiff. The report cited a "confidential source" as having advised that an individual, known as "Doctor Joe", not a licensed veterinarian, had injected a horse, at Freehold Raceway, with a substance "designed to improve a horse's performance without showing up in laboratory tests." The same source also "advised that Doctor Joe had been at both Monticello and Vernon Downs (Racetracks). A second confidential source advised that the plaintiff was "Doctor Joe" (8a). It was stated, in the report, that plaintiff had been interviewed, and had denied any

involvement in racetrack wrongdoing. Plaintiff had also denied having ever been known as "Doctor Joe", having ever had any knowledge of drugs being used at the track, or having ever used any drugs.

It was further stated, in the report, that, on November 3, 1970,

> "it was determined that a number of horses in the 6th race at Roosevelt Raceway had been tampered with. Veterinarians' opinions were that the horses had been tranquilized, probably with a drug named Reserpine. Investigation developed two additional races...in which the horses appeared to have been tranquilized with the same drug... Investigation developed the names of Angelo Caruso and Frank Costanzo as suspects and Caruso and Costanzo were subsequently barred from numerous tracks. It is believed that ... probably ... numerous calls ... were made to the home telephone number of [plaintiff] and billed to the home telephone of Angelo Caruso" (9a).

The report cited another confidential source who had identified a photograph of the plaintiff as a drug supplier who "frequented the lower grandstand at Roosevelt Raceway."

A source, denominated in the report, as NY 8-53, said that plaintiff was known as "Doctor Joe", and that plaintiff had offered "to sell him a drug which would step up his horse's performance."

The report stated, further, that horse owner Price, at one time, saw indications that his horse had been the subject of

tampering. The horse raced well for one-half mile and then slowed down.

> "He added the manure was very loose and the horse acted strangely. He was aware of the fact that this had not happened only to his horse, but had happened to several horses. He had heard of Doctor Joe at Freehold but did not know his real name. After the investigation into the race involving Price's horse, during which he mentioned the name of Doctor Joe, he went to Pompano Park, Florida. Doctor Joe approached him at Pompano in early January, 1969 and asked Price what Price had said about him. He was aware of the fact that Price had made some kind of statement about him."

Plaintiff, according to the report, was interviewed on January 12, 1971, at his Union City home. He said that he knew Angelo Caruso for about five months; that he had seen Caruso twice at Freehold, and three times at New York tracks, and had talked to him, on the phone, only once. He knew that, in the fall of 1970, Caruso owed trainer Luchento a large training bill, and he called Caruso's home twice, at Luchento's request, to ask him to pay. Each time, Caruso was out, but he called back, and said he would take care of the bill. Plaintiff "did not consider Caruso a friend." On January 19, 1971, Luchento advised that he had not asked plaintiff to call Caruso (10a). Luchento had told plaintiff he was going to train a horse named "Matt Rodney." Plaintiff said he knew the horse and Caruso, its

owner. Caruso paid $500 on his training bill "just before Christmas." Plaintiff brought the payment to Luchento.

On February 26, 1971, Caruso, interviewed at the Racing Commission under oath, said that he gave $500 to plaintiff to be given to Luchento on account of the training bill. Caruso said he had known plaintiff "for a couple of years."

The report stated further, that:

> "A confidential source ... advised in April 1971 that he has known trainer-driver Frank Presto since he first entered the sport. In 1965, Presto had a horse named 'Key Witness' ... insured for $25,000, which in the opinion of the source, was vastly overrated, and subsequently went lame ... A fire began in the stall next to 'Key Witness' and the horse was asphyxiated. The $25,000 insurance claim was paid.
>
> " A confidential source in law enforcement advised that Presto was convicted ... of... making false statements on FHA mortgage loan application ....
>
> "As a result of the conviction, Presto's NYSHRC license was subsequently suspended and he was denied a license in 1969.
>
> "Another confidential source, a licensed trainer-driver, advised in April 1971 that ...Presto is friendly with [plaintiff]. The two had been together at Green Mountain Park, Vermont, on March 25, 1971, when the horse 'Pacific G' won ... in spectacular time ... This source commented that whatever Doctor Joe gave the horse, it had really helped (11a).
>
> "The source also said that the owner of the

> horse, Fred Snow, Saddle River, N.J. is acquainted with [plaintiff].
>
> "...Presto ... on 4/6/71 ... admitted travelling to Green Mountain with [plaintiff] and others. He believes that [plaintiff] bet the horse 'Pacific G' and also 'Dag's Lady' both of them trained by Presto. He added that on April 4, 1971 both horses raced again and lost at least two or three seconds compared to the times on their previous trip ... He believes both horses should have won... on 4/4/71 and that they had not been trained since the previous race. He also said he had learned that [plaintiff] was at the track on the 4th but did not see him....
>
> "On 4/29/71 NY 8-53 advised that...Presto had been racing at Green Mountain and in his estimation Presto is no good for the sport. Presto is related to the Snows from Saddle River, N.J. and they are 'gamblers'. [Plaintiff], according to NY 8-53, is friendly with the group and the fact that he would travel to Green Mountain on the night the two Snow horses won is no surprise to him."

Further, according to the report,

> "Another confidential source who is a licensed driver-trainer, advised on 5/14/71 that he recognized the person in the photograph of [plaintiff]; however, he said that he knew him as Joe Brock ... He said [plaintiff] approached him several times in the stands at Freehold and he eventually purchased some supplies from [plaintiff]; B-12, liver and iron and camphor and oil. [Plaintiff] always filled the orders within a couple of days of the time the source placed the order."

In the report, it was also stated that,

"Gerald Baldachino, owner-trainer-driver, advised on 5/14/71 he is acquainted with [plaintiff] and saw [plaintiff] at Green Mountain Park on a few occasions in 1971. One occasion was when 'Pacific G' and 'Dag's Lady' both won in very fast times. He knows that [plaintiff] has sold veterinary products although Baldachino has never purchased any from him. He learned that [plaintiff] used to get his supplies from a veterinary supply house in Union City, N.J. but has heard there was a falling out and [plaintiff] is now getting his supplies from Canada.

"On 5/20/71, Anthony Perone, Chief Investigator, NYSHRC, advised that [plaintiff] was being placed on the New York 'B' list, based on his association with Angelo Caruso and possible involvement in the tranquilization of horses at Roosevelt Raceway 11/3/70.

"On 4/5/71 Dan Ricco, owner-trainer-driver, advised that he had seen [plaintiff] spend time in the barn of Robert Fesh during the previous two years at Monticello. Ricco had heard that [plaintiff] was charging from $100-$150 to treat a horse to improve his performance.

"A confidential source advised during 1970 that he had learned from an individual whom he considered to be knowledgeable that one 'Johnny Boy' was friendly with [plaintiff] aka Doctor Joe. This confidential source believed this individual was from Belleville, N.J. and had received 30 days in jail on a gambling charge. Johnny Boy's mother was alleged to have had ownership in thoroughbreds in 1966 or 1967. It was also rumored that this individual used to own thoroughbreds himself, however, he was quoted as saying he didn't need to own any since he had control of enough.

"According to this confidential scurce the information he received from his own contract indicated 'Johnny Boy' got 'the stuff' and gave it to Doctor Joe and instructed him how to use it.

"In April 1971, the above confidential source indicated he believed the name of 'Johnny Boy' was John Egidio from Belleville, N.J. In May, it was determined Egidio, DOB: 1/9/28, had been arrested for gambling on 11/18/52 and sentenced to 30 days in the County Workhouse.

"On 7/23/71, a confidential informant advised that about four years ago there was a group of individuals from the Bloomfield, N.J. area who were involved in corrupt racing. One of the individuals was named Otto Torrisi (ph) and Torrisi was an owner of harness horses, as well as being involved in thoroughbred racing.

"The informant also advised that this group of individuals, during this same period, was involved in obtaining drugs and medications for horses and selling them to horsemen. The informant believes that this group was the source of the material which [plaintiff] was attempting to sell horsemen so that they could improve their horses' performance.

"On August 16, 1971, Gerald Baldachino stated he first met [plaintiff] around 1964 or 1965 at Holiday Farm, which was owned by Joe Minetto... At that time he (Baldachino) was getting some supplies from Cornell Drugs in Union City and [plaintiff] would often deliver these supplies to the farm. The owner of Cornell Drugs was and is Joe Klausner. After a period of time there was a falling out between Klausner and [plaintiff] because

[plaintiff] was going around to horsemen trying to sell them directly. [Plaintiff] told Baldachino he went to Canada for a short time to work with vets in that country and was talking about Canadian products. To Baldachino's mind this seemed to be [plaintiff's] first exposure to horses. namely, his coming on to Holiday Farm. Baldachino had no knowledge that [plaintiff] ever owned a horse.

"He further maintained he had never let [plaintiff] touch one of his horses nor did he ever purchase anything from him. The reason for this was because he (Baldachino) felt his knowledge of horses was far superior than [plaintiffs].

"On August 17, 1971, Baldachino stated he feels that he has no direct knowledge that [plaintiff] has ever treated horses because he personally has never seen him physically give a horse anything. He did admit that [plaintiff] would tell him that he did hit horses for various drivers and made requests to be allowed to treat his, Baldachino's horses. He again stated that he never allowed him to treat any of his own horses. He maintained that despite the allegations and stories around the track concerning [plaintiffs] activities and despite the fact that [plaintiff] was selling supplies to the various trainer/drivers and despite the fact that [plaintiff] actually offered to treat his horses, Baldachino still maintained that he had no direct knowledge of wrongdoing on the part of [plaintiff]. While [plaintiff] mentioned several drivers to him as having used his service, the only name that came to mind at the moment was Marsh, a trainer from Delaware. He also believed that perhaps Tom Luchento may have used [plaintiff] but again denied any direct knowledge of that being a fact.

"In July 1972 an owner/trainer while being interviewed in connection with another matter at Monticello Raceway, advised that he recognized a photograph of [plaintiff] as a person he knew only as Joey. He said that he had met Joey years ago when Gerry Baldachino was training his horses at Minetto's Farm in Northvale, N.J. He said he had been friendly with Baldachino at the time and Baldachino introduced him to [plaintiff]. The source said he had subsequently disassociated himself with Baldachino and as a result has seen [plaintiff] only once or twice in the ensuing years at the track.

"Gerald J. Baldachino and one of his owners, Angelo Gregos, was the subject of an HTS and New Jersey State Police combined investigation in 1971. As a result of interviews, with the State Police, (which were tape recorded) Baldachino was given a polygraph test which indicated considerable deception on Baldachino's part as regarded his denials of involvement in corrupt racing practices. Gregos subsequently offered a $1,000 bribe to State Police Detectives to suppress the results of the polygraph exams and both Baldachino and Gregos were indicted on various charges. At the trial the tapes made by the State Police were played for the jury and were reported in the Press. Baldachino indicated that he had been approached 'once a week' to fix races but denied that he had not reported suggestions made to him that he fix the race and claimed that he did not know that he was supposed to report them. In explaining his failure to report approaches, Baldachino said 'you don't understand me. Your a ... a guy comes up to you like, talking [plaintiff]. I would say, once a week in my racing career guys come and tell me they can hit your horse or improve your horse'" (13a-15a).

In further support of defendant's motion to dismiss, defendant's president deposed that defendant was engaged "in the

investigation and maintenance of the integrity of the Harness Racing sport; that the report, concerning plaintiff was at no time" designated to any individual or organization that did not have the duty of maintaining the security and honesty of the Harness Racing sport, that defendant "has not rendered this report to any bank or similar type of credit agency"; and that "at no time has the defendant been engaged in business as a credit reporting agency" (35a-36a).

In opposition to the defendant's motion to dismiss the complaint, an attorney for the plaintiff affirmed that stated purposes of defendant's formation, appearing in defendant's certificate of incorporation, are private investigation and the furnishing of information as to the personal character and activities of any one connected with horse racing (37a). The Statute, Fair Credit Reporting Act, 15 U.S.C. 1681a (e) defines the term, "investigative consumer report" to be a report on a consumer's character, reputation, personal characteristics or mode of living, based upon information obtained from the consumer's neighbors, friends or associates. In Section 1681a (f) of the Act, the term, "consumer reporting agency" is defined as meaning

> "any person which, for monetary fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

In Section 1681b(3)(D) of the Act, it is provided

> "that a consumer reporting agency may furnish a consumer report to a person which it has reason to believe 'intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.'"

Defendant admits conducting an investigation of the plaintiff and has submitted the report to racing commissions and racetracks which have utilized the defendant's report

> "in evaluating plaintiff's qualifications for licensing and employment. It is plaintiff's contention that, in its activities, defendant has failed to comply with provisions of the Fair Credit Reporting Act" (38a).

The plaintiff's attorney also affirmed that the "issues presented in this lawsuit were not raised in the prior lawsuit between the parties" (39a).

THE DECISION OF THE DISTRICT COURT

The District Court, in its decision, relied upon the facts "fully developed in a plenary action (73 Civ. 1913)". Defendant was:

> "organized to serve as sort of an investigative arm of race track owners and racing licensing commissions ... (3a).... It is defendant's duty to supply its clients with all possible information including unverified rumors -- about horse owners and others."

The District Court pointed out that, in the previous action, defendant did not dispute that it "had provided several of its clients with various unfounded rumors about plaintiff." Defendant claimed that it had made the report in discharge of its duties to its clients and that its conduct was privileged. The claim of privilege was upheld, and the complaint was dismissed (4a). The District Court found that plaintiff's allegation, in the complaint in this action, that he was "employed" in the business of horse racing, was not supported by the evidence in the prior action which established that plaintiff:

> "was no one's employee but acted exclusively as an owner of horses ... plaintiff cannot show that any of defendant's reports were used to determine his eligibility for credit, insurance or employment. Porter v.

Talbot Perkins Childrens Services (S.D. N.Y. 1973) 355 F. Supp 174" (5a).

The District Court found:

> "it unnecessary to consider whether defendant was acting as a (consumer reporting agency) so that plaintiff could maintain a cause of action if he could have alleged that he had been denied employment as a driver or trainer working for other owners" (5a).

The District Court held:

> "that nothing in the Act or in its history suggests that it was intended to apply to an investigative agency whose activities are confined to providing information to governmental agencies or other persons who are themselves prohibited from using the information without providing due process to any person affected thereby."

The District Court dismissed the complaint (6a). From the judgment entered on this decision (2a) this appeal is taken.

QUESTIONS PRESENTED

A. Is the defendant a consumer reporting agency within the meaning of the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq?

B. Is the report of the defendant, regarding plaintiff's character, activities, etc., a consumer report within the meaning of the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq?

C. Is this action barred by the doctrines of res judicata and collateral estoppel?

D. Is there clear prejudicial, reversible error in the District Court's determination that the complaint must be dismissed because the plaintiff did not show that the defendant's report was used to determine plaintiff's eligibility for credit, insurance or employment?

E. Is this action barred by the Statute of Limitations?

F. Have plaintiff's rights, under the Fair Credit Reporting Act, been violated by the making of the subject report by the defendant?

G. Is plaintiff required to allege specific damages?

The District Court found it "unnecessary" to answer A, but opined that it would be answered negatively if required.

The District Court did not answer B or E.

In the effect, the District Court answered C positively and F negatively.

This Court of Appeals is requested to answer D affirmatively.

ARGUMENT

POINT I

THE DEFENDANT IS A CONSUMER REPORTING AGENCY WITHIN THE MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. 1681 ET SEQ.

A consumer reporting agency, within the meaning of the Fair Credit Reporting Act, is any person or organization that collects information that may be utilized, among other purposes, for evaluating the subject's qualifications for employment.

The consumer reporting agency, to which the (Fair Credit Reporting) Act is directed, is defined as follows:

> "The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports §1681a(f)."

* * *

"A finding that a prospective defendant fits within these definitional boundaries is requisite to the imposition of procedural requirements and possible liabilities contained in the Act.

"Essentially this definition contains four links. (1) The consumer reporting agency must act for monetary fees, dues, or on a cooperative non-profit basis; (2) it must regularly engage in whole or in part in gathering or evaluating information on consumers; (3) the purpose of such activity must be the distribution of information to third parties engaged in commerce; and (4) the agency must use a facility of interstate commerce to prepare or distribute the reports.

"The Federal Trade Commission, which is vested with enforcement powers under the Act, §1681s, has provided some preliminary interpretations of the Act, 4CCH Consumer Credit Guide ¶11, 301 et seq., to which the Court may refer for guidance . Fernandez v. Retail Credit Co., 349 F. Supp. 652 (E.D. La. 1972).

"The Federal Trade Commission guidelines have interpreted the coverage of the phrase 'consumer credit agencies';

Obviously, this covers all credit bureaus and others whose business is to create and disseminate such [consumer] reports. However, there are many others who may from time to time function as consumer reporting agencies and, to the extent they issue consumer reports, they will be covered by the Act. For example, some banks and finance companies have engaged in the practice of giving out credit information other than that which they have developed from their own ledgers. To the extent that they give out information and experience gained from other creditors, such banks and finance companies

would be functioning as consumer reporting agencies and would be required to comply with the terms of the Act. As indicated earlier, giving out a firms's own ledger experience does not make it a consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage 'in whole or in part' in the the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a consumer report ...¶11, 305.

"The balance of the Federal Trade Commission's interpretation confirms that the agency considers that the Act is dealing with commercial purposes. The persons mentioned by the Federal Trade Commission in its full interpretation are banks and finance companies, detective agencies and others preparing employment reports, and collection agencies, all of which perform services which aid and support institutions making economic decisions, such as whether to give employment or whether to loan money. It was to insure accuracy in reports from such organizations, affecting an individual's eligibility for credit, insurance or employment, that the Act was passed; its aim was to impose a legislative filter on the input of the burgeoning consumer credit reporting industry to the flow of commerce. §1681(a)(2)-(4); Fernandez v. Retail Credit Co., 349 F. Supp. 652 (E.D. La. 1972). Certainly where an agency regularly sells consumer reports which affect commercial eligibility, that agency would properly fall within the ambit of the Act. See ¶11, 354 of the F.T.C. guidelines, where the following interpretation is advanced:

It is quite common for certain businesses such as insurance companies to request reports on a prospective (or current) insured from various State Departments of Motor Vehicles.

These reports are sold to such companies and generally reveal a consumer's entire driving record, including arrests for speeding, drunk driving, involuntary manslaughter, etc. It is the Commission's view that, under the circumstances in which such a State motor vehicle report contains information which bears on the 'personal characteristics' of the consumer (i.e., when the report refers to an arrest for drunk driving), such reports sold by a Department of Motor Vehicles are 'consumer reports and the agency is a 'consumer reporting agency' when it sells such reports.

"The definition of a consumer reporting agency interlocks with the definition of a consumer report. A consumer reporting agency is an entity that, in part, issues consumer reports; a consumer report is a report that, among other things, is issued by a consumer reporting agency. §1681a(d) and (f).

"'Consumer report' is defined as follows:

The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under 1681 b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report ....

"Among the 'other purposes authorized under section 1681b' is a report to a person who

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial reponsibility or status ....

"This definition also has four elements, each of which must be present for a report to fall within the coverage of the Act. (1) There must be a communication of information (2) by a consumer reporting agency, as defined in the Act, (3) which bears on a consumer's credit status or general reputation, and (4) which is used or is expected to be used in the determination of the consumer's eligibility for credit, employment, insurance, or other commercial benefit specified in the Act.

".... The focus of Congress was the consumer credit industry (§1681) which has been exercising a growing influence in economic decision-making. Of particular concern was the effect of information compiled and forwarded by an entity not dealing directly with an individual, which information would bear on that individual's ability to secure insurance, credit, or employment. Those entities which regularly engage in the collection and dissemination of information with reference to these determinations are now subject to a legislated standard of accuracy and accountability ....

"... the Fair Credit Act as enacted ... is designed to check informational abuses in the commercial arena." Porter v. Talbot, 355 F. Supp. 174, 176-178.

"The compliance pamphlet [of the Division of Consumer Credit and Special Programs, Bureau of Consumer Protection, Federal Trade Commission] explains that the term 'consumer reporting agency' covers anyone who might render a consumer report, so that included would be many others than credit bureaus, etc., who may from time to time function as consumer reporting agencies, and that to the

> extent that they issue consumer reports, they will be covered by the Act. The pamphlet continues that in order to be a consumer reporting agency, the firm must engage 'in whole or in part' in the practice of assenbling or evaluating consumer credit information, or other information on consumers, for the purpose of furnishing consumer reports to third parties. The pamphlet also notes that persons who compile reports on individuals for employment purposes are also covered by the Act, as are other groups which meet the stated test." 17 ALR Fed 675, 702-703.

The defendant, at bar, issued a report describing alleged activities and associations of the plaintiff relating to horse racing. Its purpose, in circulating this report, was to provide information to individuals and organizations interested in maintaining the integrity and security of horse racing (26a). Defendant does not deny compiling and circulating the report (26a-27a). The authorities, above cited in this Point I, clearly establish that the defendant, in the circumstances of this record, is a Consumer Reporting Agency within the meaning of the Act.

POINT II

THE REPORT OF THE DEFENDANT, REGARDING PLAINTIFF'S CHARACTER, ACTIVITIES, ETC., IS A CONSUMER REPORT WITHIN THE MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. 1681 ET SEQ.

The report of the defendant (8a-15a) is a communication of information intended to adversely affect plaintiff's worthiness, character, general reputation, and licensing and employment qualifcations. It is based on vague assertions by unnamed "confidential" sources, and represents the very type of conduct and dissemination that the Fair Credit Reporting Act, 15 U.S.C. 1681, et. seq., is designed to prevent.

> "The Fair Credit Reporting Act, 15 U.S.C. §1681, was aimed at problems in connection with consumer reporting agencies. Among its purposes were 'to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for consumer's right to privacy' and 'to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for ...information in a manner which is fair and equitable to the consumer ....' 15 U.S.C. §1681 ... It creates civil liability only for negligence in failing to comply with any requirement imposed under this sub-chapter with respect to any consumer ....' Id. at §1681o ....
>
> "The Act defines the term 'consumer report' as 'any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used

or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit ..., or (2) employment purposes, or (3) other purposes authorized under section 1681 b of this title.'" Fernandez v. Retail Credit Company, 349 F. Supp. 652, 653-654, supra.

"The purpose of the Fair Credit Reporting Act is to encourage the use of fair and impartial procedures by consumer reporting agencies by enabling individuals to protect themselves against the dissemination of inaccurate or misleading information bearing on their credit worthiness. Introduction and Section-By-Section Analysis of 'Good Name' Bill, 116 Cong. Rec. 6200 (1970)." Conley v. TRW Credit Data, 381 F. Supp. 473, 474.

"The purpose of the Fair Credit Reporting Act is to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment. 116 Cong. Rec. 36572 (1970). Congress ascertained a 'need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.' 15 U.S.C. §1681 (a)(4). The Act was designed to require consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this [Act] §1681(b)....

"For the most part, the consumer reporting industry is comprised of credit bureaus, investigative reporting companies and other organizations whose business is the gathering and reporting of information about consumers for use by others in making

> a decision concerning whether to grant credit, underwrite insurance or employ the subject of such reports. F.T.C., Compliance with the Fair Credit Reporting Act, 4 CCH Consumer Credit Guide ¶ 11,302 (1971)." Porter v. Talbot, 355 Fed. Supp. 174, supra.

Since the subject report contains information bearing on plaintiff's qualifications for employment, or licensing, or credit worthiness, describing the views of neighbors and associates, named and not named, regarding plaintiff's character, general reputation and personal characteristics, the report, by virtue of the Statute and the above authorities, is a consumer report within the meaning of the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq.

POINT III

THIS ACTION IS NOT BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

The issues, raised in this action, are entirely unrelated to the prior action between the parties. The prior action was based upon the traditional principles of common law libel, and, since the libel consisted of a report within an industry, it was held that there could be no recovery in the absence of proof of actual malice. The trier of the facts found in favor of the defendant on that crucial factual issue, the question as to whether the libelous publication was motivated by actual malice, and, for that reason, the action was resolved in defendant's favor. The issue, in the present action, is whether the plaintiff is entitled to recovery under the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq. In this action, under the Statue, there is no requirement of proof of malice. It needs no citation of authority to support the conclusion that there is no similarity of issues between the two actions, and, therefore, that the doctrines of Res Judicata and Collateral Estoppel have no application. This Court has held that:

> "Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially 'the same

> bundle of legal principles that contributed to the rendering of the first judgment.' [Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715] at [333 U.S.] 602, 68 S. Ct. at 721."

Neaderland v. C.I.R., 424 F.2d 639, 642, cert. den. 400 U.S. 827. The legal principle, at bar, the application of the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq., is clearly not the same principle, the question of qualified privilege, which was the determining factor in the prior action.

POINT IV

IT WAS CLEARLY PREJUDICIAL, REVERSIBLE ERROR FOR THE DISTRICT COURT TO DETERMINE THAT THE COMPLAINT HAD TO BE DISMISSED BECAUSE THE PLAINTIFF DID NOT SHOW THAT THE DEFENDANT'S REPORT WAS USED TO DETERMINE THE PLAINTIFF'S ELIGIBILITY FOR CREDIT, INSURANCE OR EMPLOYMENT.

The District Court dismissed the complaint because it held "that plaintiff cannot show that any of defendant's reports were used to determine his eligibility for credit, insurance or employment" (5a). The dismissal, on this ground, was clear error. In order to sustain a cause of action under the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq., it is sufficient to show that the report contains carelessly gathered, unreliable information relating to plaintiff's qualifications. It is not required that it be shown that the report was actually used.

It has been held that a cause of action arises when an agency issues a report "that could be used for one of the purposes enumerated in §1681a". Belshaw v. Credit Bureau of Prescott, 392 F. Supp. 1356, 1359-1360, emphasis in the original.

In the Belshaw case, the Court, at 392 F. Supp. 1360, pointed out that the plaintiff "did not apply for credit, insurance, or employment. A report made on an individual in these circumstances must comply with the Act".

The District Court, at bar, relied, in dismissing the complaint, also upon the fact that "the evidence before the Court in the prior action conclusively establishes that insofar as his horse racing activities were concerned he was no one's employee" (5a). This was clearly erroneous. It has been held that the practice of medicine constitutes employment under the Statute, even if the practitioner practices as a single practitioner.

> "If he concludes to practice his profession as a single practitioner or as a member of a medical partnership, we still consider him as 'employed', either self-employed or employed by the patients who pay him fees."

Hoke v. Retail Credit Corporation, 521 F.2d 1079. Similarly, at bar, plaintiff should be considered to be employed whether or not he was anyone's employee. Self-employment should be held sufficient to sustain a cause of action, under the Act, as was held in the Hoke case, supra.

It has also been held that the gathering of unreliable information or the failure to disclose the nature and sources of all information, is actionable.

> "Where consumer reporting agency gathered personal information ... only from consumer's neighbors, information was not verified, ... actions of agent were so reprehensible as to justify award damages under Fair Credit Reporting Act, ... 15 U.S.C.A.§§1681e(b), 1681n, 1681o.

"Failure of consumer reporting agency to disclose nature and substance of all information contained in its files concerning consumer who sought such information, agency's forcing consumer to return to its offices on several occasions and attempting to withhold from consumer information that was rightfully due him under the Fair Credit Reporting Act warranted inposition of liabilities for violation of the Act. Fair Credit Reporting Act, ... 15 U.S.C.A. §§1681g(a)(1), 1681n.

"Although consumer suffered no lost wages or medical expenses as result of wilful violation of Fair Credit Reporting Act by consumer reporting agency, where he suffered mental anguish and had symptons of sleeplessness and nervousness and many times he had to leave his employment in order to meet with agency as a result of its refusal to disclose information, consumer was entitled to actual damages ... $25,000 as punitive damages and $12,500 for attorneys fees and agency must pay costs. Fair Credit Reporting Act, ... 15 U.S.C.A §§1681e(b), 1681n, 1681o."

Headnotes in Millstone v. O'Hanlon Reports, Inc., 383 F. Supp. 269.

"... The [Fair Credit Reporting] Act [15 U.S.C. 1681, et seq.] regulates more than 'consumer reports.' Section 1681g requires that a consumer reporting agency disclose to a consumer the nature, substance, and sources of information in its files with respect to that consumer. In the event that the consumer disputes the accuracy of any such information, Section 1681i establishes procedures allowing the consumer to challenge the information and requiring the reporting agency to either delete or reinvestigate. Damages are provided for in Section 1681n for willful

> non-compliance, and in Section 1681o for negligent non-compliance, with these Sections of the Act. The mandate of Sections 1681g and 1681n is not restricted to information classified as a 'consumer report.'"

Fernandez v. Retail Credit Company, 349 F. Supp. 652, 655, supra.

POINT V

THIS ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Statute of Limitation, provided in the Act, is two years (15 U.S.C. 1681p). The defendant's report is dated February 6, 1973. The action was commenced by the filing of the complaint on January 21, 1975. The summons and marshal's return were filed January 29, 1975 (1a). Defendant has pleaded the Statute of Limitations as an affirmative defense (21a-22a). There is no basis for such pleading.

POINT VI

PLAINTIFF'S RIGHTS, UNDER THE FAIR CREDIT REPORTING ACT, HAVE BEEN VIOLATED BY THE MAKING OF THE SUBJECT REPORT BY THE DEFENDANT.

The subject report contains much information, devastatingly damaging to plaintiff's reputation, obtained from unidentified "confidential" sources. The information, thus obtained, includes vague charges, innuendoes and insinuations to the effect that plaintiff has participated in race fixing, and in

administering drugs to horses for the purpose of slowing them down, or speeding them up, as the case might be. Plaintiff has suffered these charges, innuendoes and insinuations with practically no opportunity to confront his accusers, or to rebut the charges. Defendant's entire procedure reeks with unfairness, indecency, and reckless disregard for plaintiff's rights. Such procedure is clearly in violation of the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq.

> "Noting that the FCRA [Federal Credit Reporting Act, 15 U.S.C. 1681, et seq.] constitutes the first federal regulation of the consumer reporting industry, which consists primarily of credit bureaus, investigative reporting companies, and other organizations whose business is the gathering and reporting of information about consumers for use by others in making a decision concerning whether to grant credit, underwrite insurance, or employ the subject of such reports, a division of the Federal Trade Commission [Division of Consumer Credit and Special Programs, in its pamphlet concering compliance with the Fair Credit Reporting Act, and appearing at 4 CCH Consumer Credit Guide ¶¶11301 et seq.] has explained, too, that the basic purpose of the Act is to assure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 17 ALR Fed. 675, 678-679.
>
> "The Senate Committee Report [on the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq.] states that, in addition to the purposes already recited, the Act is designed 'to give consumers a chance to correct inaccurate information in their credit file;

> to preserve the confidentiality of such information; and to prevent undue invasions of the individual's right to privacy'. Congressional Record--Senate, October 9, 1970, S1763, p. 21263."

Fernandez v. Retail Credit Company, 349 F. Supp. 652, 654, supra.

Consumer reporting "agencies must follow reasonable procedures designed to assure the maximum possible accuracy of the information, and must utilize an effective information verification procedure." 17 ALR Fed. 679.

As an instance of defendant's inconsistency and improper tactics, it may be noted that, in the answer, defendant pleaded "that there was no publication of the report on the plaintiff herein" (22a). Yet, in its Rule 9(g) statement, it was admitted that

> "Defendant did compile a report, dated February 6, 1973, on the plaintiff, Joseph Thomas Schettino and did forward this report to certain individuals and corporations ..." (26a-27a).

In an action brought under the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq., the defendant moved for summary judgment, contending that the report, in question, made in connection with a corporation's application for key man insurance, was not within the scope of the Act. The Court stated that the motion "must be granted with respect to the principal relief sought",

holding that "It must be considered that the report ... to the named insurance companies was not a 'consumer report'. The Court pointed out, however, that the Act regulated "more than 'consumer reports.'" It provides, in Section 1681g that the consumer is entitled to disclosure of the information, in the agency's files, regarding the consumer. There is provision, in 1681i, for challenge, by the consumer, of the accuracy of the information; and, in 1681n and 1681o, for damages for non-compliance. The Court held that, "The mandate of Sections 1681g and 1681n is not restricted to information classified as a 'consumer report.'"

> "The plaintiff alleges in his complaint: '[The defendant] has failed to correct these reports, ... has failed to completely disclose the reports, ... has failed to utilize the public records in making its investigation when the same were available.'
>
> "Because the plaintiff has alleged wrongs for which there are potential remedies under other Sections of the same Act, the plaintiff shall within 15 days complete his opposition to the motion for summary judgment by a memorandum that contains specific allegations of facts that constitute violations of the Act, the statutory provisions applicable to those facts, and appropriate affidavits or depositions." Fernandez v. Retail Credit Company, 349 F. Supp. 652 supra.

At bar, plaintiff has specifically pleaded violations of

his rights, including substantial wrongs for which the Act provides remedies as outlined in the Statute, and the Fernandez case, supra. (Complaint, paragraph 11, (a) to (l) inclusive, 17a-18a).

It has been held that reports, prepared by a consumer-reporting agency for the purpose of determining whether plaintiff had been accidentally totally disabled, and which were utilized by an insurer to terminate disability payments, were consumer reports within the meaning of the Fair Credit Reporting Act, 15 U.S.C. 1681, et seq. The Court stated:

> "The Court holds that the broad language of §1681b(3) (E) embraces the insurance claims investigative reports in question. There is no doubt that [defendant agency was] procured by [the insurer] to prepare these reports 'in connection with a business transaction' involving the insurance company and its insured [plaintiff], a consumer.
>
> "The Court's holding is fortified by the explicit purpose of Congress to require consumer reporting agencies to act 'in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of information' which is gathered about him. 15 U.S.C. §1681(b)". Beresh v. Retail Credit Co., Inc, 358 F. Supp. 260.

Plaintiff has alleged, at bar, unfairness, reckless negligence, and inaccuracy, regarding the contents of the subject report. It is respectfully submitted that the District Court's dismissal of the complaint was clearly erroneous.

POINT VII

PLAINTIFF IS NOT REQUIRED TO ALLEGE SPECIFIC ACTUAL DAMAGE.

Defendant contends that "plaintiff is specifically limited to actual damages sustained and possibly attorneys' fees" (32a). While the issue of damages is not properly before the Court at this stage of the action, this argument having been raised by defendant, plaintiff respectfully begs the Court's indulgence in permitting rebuttal of the contention.

> "The Fair Credit Reporting Act, 15 U.S.C.A. §1681 et seq. (FCRA) enacted in 1970, represents the first significant effort to curb some of the abuses of the credit reporting industry. It has been estimated that credit files are maintained on more than 120 million American consumers. See Hearings on S. 2360 Before The Subcomm. on Consumer Credit, 93d Cong. 1st Sess.20. This Act is an effort to provide some protection from erroneous or unauthorized distribution of this mass of information. The margin for error is not small, it being believed that as many as one out of every twenty reports may contain material errors. See 'Actions For Negligent Noncompliance Under the Federal Fair Credit Reporting Act,' 47 S. Cal. L. Rev. 1070, 1090 (1974). The Act has codified certain aspects of the common law doctrines of defamation and imposed certain new requirements. The general purpose of the FCRA is to protect the reputation of the consumer, for once false rumors are circulated there is not complete vindication. See O. Holmes, The Common Law 111 (M. Howe ed. 1963).

". . . The FCRA . . . changes the common law...by prohibiting the inclusion of certain 'obsolete' information. It is not clear whether the report here deleted, as required, any such information ...Under 15 U.S.C.A. §1681e, the FCRA, as it does throughout, requires that consumer reporting agencies, 'maintain reasonable procedures' to ensure that inaccurate or obsolete information is deleted and that a report is prepared only for permissible purposes under §1681b. The FCRA, at 15 U.S.C.A. §1681g, requires, upon proper identification, accurate disclosure to the consumer:

> '(1) The nature and substance of all information...in its files on the consumer at the time of the request.
>
> (2) The sources of information; . . . .
>
> (3) The recipients of any consumer report on the consumer which it has furnished--. . .'

"Section 1681n provides: 'Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed...with respect to any consumer is liable to that consumer in an amount equal to the sum of ---

> (1) any actual damages sustained by the consumer as a result of the failure;
>
> (2) such amount of punitive damages as the Court may allow; and
>
> (3) in the case of any successful action . . ., the costs of the action

> together with reasonable attorneys' fees . . .'

"Section 1681o imposes liability for negligent non-compliance, and for any negligent failure to comply with any requirements of the Act provides a potential liability of:

> '(1) any actual damages sustained by the consumer as a result of the failure;
>
> (2) in the case of any successful action . . . the costs of the action together with reasonable attorneys' fees'. . . .

"It has been held that the general federal rule is to allow punitive damages, if there is a basis in fact, without regard to the necessity of actual damages, see Wardman-Justice Motors, Inc, v. Petrie, 59 App. D.C. 262, 39 F.2d 512, 516 (1930), wherein it was said, 'Punitive damages being given by way of punishment, there is no reason to hold that there must be actual damage, or something more than nominal damage, to justify their imposition. Punitive damages depend not upon the amount of actual damage, but upon the intent with which the wrong was done.' . . . Punitive damages are recoverable not to compensate the plaintiff, but solely to punish the defendant. . . .

"The plain language of §1681n . . . further buttresses the view that actual damage is not required in an action to enforce any liability under the Act. This section does not speak in terms of requiring actual damages; rather, it refers to actual damages as only one portion of any award or relief that might be granted. . . . This does not mean that a credit reporting agency would be held strictly liable for any violation, nor does this mean

> that a violation will render an agency liable to the unpredictable results of a punitive damages award; for the burden remains upon the plaintiff to prove wilfullness, and the Statute provides the 'reasonable procedures' defense. It would be difficult in many cases to prove actual damage as a result of any violation of the act and the tortious nature of the Act does not require that actual damages be proven, but only that they not be speculative." Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658 (Emphasis supplied)

CONCLUSION

Plaintiff should not be deprived of his day in Court. The judgment, under review, should be reversed, and the motion to dismiss should be denied.

Respectfully submitted,

Sohn & Gross
Attorneys for Plaintiff-Appellant

Joshua Gross,
Of Counsel

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUTT

JOSEPH T. SCHETTINO,
Plaintiff- Appellant,

- against -

HARNESS TRACKS SECURITY INC.,
Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the **28th** *day of* **May** *19* **76** *at* **55 Wall Street, New York, New York**

deponent served the annexed **Appendix Brief** *upon*

Sherman & Sterling

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this **28th** *day of* **May** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer